Louisiana Law Review

Volume 16 | Number 4
A Symposium on Legislation
June 1956

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TREATIES AS LAW IN NATIONAL COURTS: LATIN AMERICA*

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The problem of the validity of international treaties and their application by the courts of one of the contracting States arises mainly in connection with claims of private individuals affected by said conventions. Leaving aside the question of whether States are the only subjects of international law or whether individuals may also be such, there is no doubt that while some treaties are effective only as regards the contracting States, others do affect the interests of private persons.

When a conflict regarding the fulfillment of a treaty arises between the respective governments, the courts of one of the parties are not prone to intervene, because as Hyde has said, the other "contracting State, complaining of the infraction of the treaty, is believed to be justified in declining to admit that its rights under the agreement can be ultimately determined by a foreign local court without the consent of each party to the agreement."[1] At times, it does not even accept that jurisdiction to decide upon the rights of its citizens. In those cases the controversy will have to be decided through diplomatic negotiations or by an international tribunal.

Therefore, the result will be that generally the courts of a country will intervene when a citizen of that country establishes a claim under the terms of an international treaty. This does not preclude the possibility that the courts will also intervene on petition of a foreigner appearing before them.

In my view, the study of the application of treaties by national courts requires the consideration of the following matters:

A. When a treaty is binding upon national courts.

B. The nature of the treaty; its equivalence to the law.

*A paper presented at the Mid-South Regional Conference on International Law and Foreign Trade, sponsored for the American Society of International Law by the Louisiana State Bar Association and the Louisiana State University Law School, at Baton Rouge, La., April 19, 1956.

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1. 2 HYDE, INTERNATIONAL LAW 56 (1922).

C. Application of the treaty by national courts.

D. The problems that the application of the treaty may bring up.

In accordance with what has been requested of me for this discussion, we will look into these questions in connection with the Latin-American countries, showing general tendencies there without going into details that would lengthen this paper unnecessarily.

A. When a Treaty is Binding upon National Courts

The conclusion of a treaty involves the following stages: (a) the negotiations; (b) the ratification by the proper constitutional body; (c) the exchange of ratificiations; (d) the promulgation or publication.

Negotiation of Treaties

All Latin-American Constitutions vest in the President of the Republic, either alone or with the intervention of his Cabinet, the power to carry on the diplomatic relations of the country and the conclusion of international treaties.[2]

Ratification of Treaties

But the treaty, once it has been signed by the representatives of the contracting States, must be submitted for approval to another constitutional organ. In two countries (Cuba and Mexico), just as is the case in the United States, it is the Senate exclusively, while in the remaining countries it is the full Legislative Power either through the single assembly in unicameral systems, or through the Senate and the House of Representatives in those using the bicameral system.

Such approval is essential. Some constitutions (Cuba, article 142-g; Venezuela, article 81-3) expressly provide that without such approval the treaty will have no validity; and this provision should be considered applicable in all countries even though it has not been expressly stated constitutionally.

2. On this topic see Turlington, *The Control of Foreign Relations Under the Constitutions of the American Republics*, in 4 Cursos Monográficos of the Inter-American Academy of Comparative and International Law 187 (1954).

In this connection we should now consider the value of the so-called "executive agreements," that is, international agreements entered into by the Executive alone and not submitted later to the approval of the Legislative Power. Considerable use of these agreements was made during the Second World War and thereafter, and they have served to facilitate international relations and to solve urgent problems or those that should be kept secret. As long as their effects are maintained within the sphere of the interested governments and are carried out by them, no difficulties of an international order will be encountered. But I believe that under a system that requires approval by the Legislative Power, such agreements lack legal validity and are not binding on the State. This consequence is still more evident in those countries whose Constitutions provide (Cuba and Venezuela) that without legislative approval treaties have no validity. Let us state, however, that in Venezuela treaties are valid, even without such approval, when they deal with the execution of pre-existing obligations of the State and in other specific cases, and that "those international treaties, conventions or agreements may be provisionally carried out, where the urgency of the case so demands it."

If there has been no legislative approval, I believe that the courts of our countries would consider that the treaty lacks validity and binding force. And even before an international court the problem should receive the same solution, at least in our continent, since that is the general opinion, as we shall see further on.[3]

We may also mention at this time the problem that arises when the Chief of State ratifies a treaty without having obtained the prior approval of the Legislative Power required by the Constitution. I will merely say that although some authors, mainly those from Europe, believe that the declaration of the Chief of State is conclusive, the majority maintain an opinion to the contrary. "The majority of writers," says the distinguished American internationalist Mr. Charles G. Fenwick, "maintain that foreign governments should be held to a knowledge of the constitutional prerequisites of ratification in each country with which they are dealing; and they insist that a treaty which has been ratified without the proper observance of those requirements is

3. JIMÉNEZ DE ARÉCHAGA, CURSO DE DERECHO INTERNACIONAL 86, 87 (mimeographed shorthand notes by J. B. Míguez, 1949).

ipso facto invalid, whatever the proclamation of the head of the State may assert in that respect."[4]

Accepting that doctrine, the Inter-American Convention on Treaties adopted at Havana in 1928 states in article 1 that "treaties will be concluded by the competent authorities of the State or by its representatives, according with their respective internal law."[5] And article 21 of the Harvard Draft is still more conclusive: "A State is not bound by a treaty made on its behalf by an organ or authority not competent under its law to conclude the treaty; however, a State may be responsible for an injury resulting to another State from reasonable reliance by the latter upon a representation that such organ or authority was competent to conclude the treaty."

Regardless of what might be the fate and validity of any such treaty in an international order, I believe that in the internal ambit of the country the national courts of Latin-America would decide not to grant validity to a treaty that has not been constitutionally ratified. The Supreme Court of Cuba has said (Decision 67 of May 5, 1930, in a contentious-administrative matter) that international treaties have the force of law "once they have been legally approved by the signatory States."

Ratification has become a normal requisite at least in America. In article 5 of the Convention on Treaties above referred to, "treaties are obligatory only after ratification by the contracting states, even though this condition is not stipulated in the full powers of the negotiators or does not appear in the treaty itself."

The well-known Brazilian diplomat and jurist, Hildebrando

4. FENWICK, INTERNATIONAL LAW 436 (3d ed. 1948); 1 PLANAS SUÁREZ, TRATADO DE DERECHO INTERNACIONAL PÚBLICO 153 (1916).

5. Though this convention has been ratified only by seven countries (Brazil, Ecuador, Haiti, Nicaragua, Panamá, Peru, and Dominican Republic) its approval by the Sixth International Conference of American States of 1928 (Havana) reveals the *communis opinio* of the Continent. The fact that an Inter-American treaty is not ratified by an American State does not necessarily imply that such State is in disagreement with the treaty. In this respect the Belgian internationalist Paul de Visscher has said that "it is a sufficiently constant practice in the countries of Latin-America to abide by treaties that have not been regularly ratified. This practice is better explained when the said treaty does not create a new norm but is willing to recognize the existence of a rule generally admitted by international law, a rule which, on the other hand, corresponds to a norm of international law of the greater part of the States which it covers." DE VISSCHER, DE LA CONCLUSION DES TRAITÉS INTERNATIONAUX 218 (1943).

Accioly, confirms what has been stated above by saying that "the writers are in agreement in accepting the principle of the need of ratification in order to give binding force to treaties."[6]

Exchange of Ratifications

The approval of a treaty by the proper constitutional organ is followed by the exchange or deposit of ratifications which marks the moment when the treaty becomes binding on the contracting governments. "Treaties," provides article 8 of the aforementioned Convention, "shall become effective from the date of exchange or deposit of ratification, unless some other date has been agreed upon through an express provision."

Promulgation of Treaties

Article 4 of the same Convention orders that "treaties shall be published immediately after the exchange of ratifications. the failure to discharge this international duty shall affect neither the force of treaties nor the fulfillment of the obligations stipulated therein." We should bear in mind the distinction we have made above between conventions that affect only the States themselves and those that affect private individuals. When a treaty falls under the first group I believe that it is binding on the signatory states from the time of the exchange of ratifications. But as has been said by the Chilean writer Cruchaga Tocornal, "when the treaty imposes some obligations on individuals or creates some rights in their favor, promulgation is necessary in order that the subjects may be in a position to fulfil the former or demand the latter."[7] And Bustamante, the great Cuban internationalist says that "promulgation is a duty of the ratifying states; but the binding effects will begin only from the time of ratification and in accordance with the terms of such ratification and with the text of the treaty."[8]

If a treaty, as we shall see, has the equivalence of a law, to assume that it will govern as far as citizens are concerned without having been published is the same as maintaining the possibility that a law is effective for private individuals without having been promulgated.

6. 2 ACCIOLY, TRATADO DE DERECHO INTERNACIONAL PÚBLICO, no. 1278-A (1946).

7. 1 CRUCHAGA TOCORNAL, NOCIONES DE DERECHO INTERNACIONAL, no. 573 (3d ed. 1923).

8. 3 BUSTAMANTE, DERECHO INTERNACIONAL PÚBLICO, no. 757 (1936).

B. The Nature of the Treaty

How is it that a treaty, an act of the State in the sphere of its foreign relations, has the effectiveness of an internal law? In pure doctrine, and in accordance with the dualistic concept of Triepel, who assigns to international law and to internal law spheres of action that are entirely different, a treaty does not become effective within a State except through an act of express recognition, for instance, by a law. Under the monistic theory of Kelsen, the law is only one whether it be international or internal and, inasmuch as the former is admitted to have supremacy over the latter, a treaty governs directly *per se* and prevails over an internal norm in conflict therewith.

Due to the brevity of our study we will leave aside this theoretical discussion in order to go into the problem in the positive legislation of our countries in which we will find an intermediate solution. In fact, due to the procedure that requires that treaties be approved by the Legislative Power it has been admitted that once the convention has been concluded with all the aforementioned constitutional reguisities, it becomes effective within the territory of the State without the need of a law expressly to put it into effect. That is why the Latin-American writers, in general, agree in granting a treaty the same force as a national law.

There is a first group of constitutions, such as those of Argentina (article 22), Mexico (article 133) and Paraguay (article 4) which, following the form of that of the United States (article VI, clause 2) provide that treaties, together with the Constitution and the laws enacted by Congress, are the supreme law of the nation. It is evident that in those countries, such as the United States and Mexico in which the approval or ratification of the treaty is given only by the Senate, such a declaration is the same as saying that the legislative function is not exercised exclusively by Congress, but also by the President of the Republic and the Senate through international treaties. This observance is applicable to Cuba, because in Cuba the Senate alone ratifies international conventions and these, as we shall see, have the force of law.

A second group of eighteen countries present no problem on this question, because in them the treaties must be approved by

the whole Congress, whether this be bicameral[9] or unicameral[10] since that approval, even though it is not exactly a law, gives the treaty the same efficacy as a law.

A third category is constituted by Cuba. Our Constitution contains no declaration similar to that of Argentina, Mexico, Paraguay, and the United States, in the sense of saying that treaties are laws. Yet, at the same time, our Legislative Power is comprised of two bodies (the House and the Senate) but only the Senate must approve the international conventions, except those that are peace treaties which must also be submitted to the House. It would be therefore possible to argue that a treaty is not equivalent to a law since it has not been approved by the House of Representatives.

The matter was very wisely decided upon by our Cuban Supreme Court (Decision No. 8 of March 10, 1911, in a matter of constitutionality) in declaring that treaties "are equal to the laws under several aspects and chiefly as to the binding force of their provisions for the citizens in the contracting nations." In another decision (No. 77 of May 5, 1930, in a contentious-administrative matter) it said that "international treaties, once approved in a legal manner by the signatory states, as far as they are concerned have the same force as its laws." And on May 19, 1932 (Decision No. 129, in a contentious-administrative matter) it declared that "the Paris Convention on the Protection of Trade-Marks and Patents which was signed by the representatives of Cuba in Washington on February 20, 1929 and promulgated in the Gazette of May 24, 1930, . . . is a law of the Republic."

Those declarations were made under the terms of the 1901 Cuban Constitution, but since the 1940 Constitution now in force is substantially the same on the problem that we are considering, the decision No. 66 of June 28, 1944 (in a matter of constitutionality) repeats the declaration made in No. 8 of 1911 (mentioned above), to the effect that the treaties are on an equal basis as the laws with regard to the binding force of their norms.

Among Latin-American writers the general opinion confirms

9. Bolivia, Brazil, Colombia, Chile, Dominican Republic, Ecuador, Haiti, Nicaragua, Peru, Uruguay, and Venezuela. Also Argentina.

10. Costa Rica, El Salvador, Guatemala, Honduras, and Panama. Also Paraguay.

what has been heretofore stated: a treaty is in the nature of a national law.[11]

C. APPLICATION OF THE TREATY BY NATIONAL COURTS

Having established the foregoing principle that may be considered unanimous in the countries of Latin-America, let us now consider the matter regarding the effectiveness of treaties in an internal order and the process of their interpretation and application by the national courts.

In this respect a distinction must be drawn between two classes of treaties: (a) those that we might call self-executing, that is, those whose provisions may be directly applied by the courts because they are sufficient in themselves and do not need to be complemented by any other measure or law; and (b) those that might be called supplemented performance which, due to the insufficiency of their terms, require a supplementary law in order to be applied.

With regard to the former there is no doubt that they should be applied by the courts exactly under the same conditions as the national laws are applied, and this has been the case in Cuba where treaties have been applied not only by the Supreme Court but also by lower courts every time that a rule established by an international treaty has been brought before them. And in so doing, these courts are of course empowered to interpret the treaties and determine their scope and their concerte effects, the same as they do with the national laws.[12]

With regard to the latter I believe that the same rule that has been accepted by the courts of the United States should govern, a rule Hyde has summarized as follows: "In the case of a treaty requiring a legislative enactment in order to make

11. PLANAS SUÁREZ, TRATADO DE DERECHO INTERNACIONAL PÚBLICO 151 (1916); 3 BUSTAMANTE, DERECHO INTERNACIONAL PÚBLICO 396 (1936); Ruiz Moreno, *Relaciones entre el derecho nacional y el derecho internacional en América*, in PROCEEDINGS OF THE EIGHTH AMERICAN SCIENTIFIC CONGRESS 88 (1940); Cruchago Ossa, *Relaciones entre el derecho internacional y las legislaciones nacionales*, in 10 PROCEEDINGS OF THE EIGHTH AMERICAN SCIENTIFIC CONGRESS 53 (1940).

12. The following are decisions of the Supreme Court of Cuba in which international treaties were interpreted and applied: 67 (Cont-Adm.), September 13, 1907; 5 (Inconst.), June 3, 1909, 57 (Civil), June 28, 1909; 59 (Cont-Adm.), November 1, 1917, 62 (Civil), July 21, 1921; 8 (Inconst.), March 19, 1930; 67 (Cont-Adm.), May 5, 1930; 129 (Cont-Adm.), May 19, 1932; 348 (Cont-Adm.), November 2, 1932; 33 (Inconst.), April 28, 1937; 578 (Cont-Adm.), October 5, 1949. Of the Court of Appeals of Havana: Auto 420, December 24, 1931.

its provisions effective, the courts of the United States do not regard the agreement as one to be enforced by them until the requisite legislative action is taken."[13]

There is no decision of the Supreme Court in Cuba that settles this question; but the problem has been brought up before it with respect to certain articles of the 1940 Constitution which made changes in the national legislation. The court had to make a distinction between two kinds of constitutional rules: one, which it declared of possible direct application, and others, with regard to which it stated that their application would necessarily require a supplementary act of Congress, and inasmuch as that law had not been enacted, it was impossible to apply the constitutional provision.[14] As may be seen, this is the same problem as that of the treaties requiring supplemented execution. Therefore, it is to be expected that the solution would be identical.

When a State signs a convention, the execution of which requires that the other State enact a supplementary law, it knows that it cannot expect the courts of that country to apply the treaty until such a law is enacted. There is no doubt that the convention will have created the obligation of enacting the law since, as the Permanent Court of International Justice (Consultative Opinion No. 10 of February 21, 1925) has said, "a State that validly contracted international obligations is obliged to make in its legislation such changes as may be necessary to assure the execution of the commitments acquired." Although the Legislative Power cannot be compelled to enact the law if it does not wish to do so, its refusal or omission is a violation of the convention and the other party thereto will have the right to establish a claim through diplomatic channels or before an international tribunal, as the case may be; however, the national courts in the interim would be prevented from applying the treaty.

D. Problems Arising from the Validity of a Treaty

The efficacy of a treaty within the State poses to the jurist and the practicing attorney complicated problems. We are going

13. 2 Hyde, International Law 58 (1922), who quotes the following decisions: Haver v. Yaker, 76 U.S. (9 Wall.) 32 (1869); United States v. Percheman, 32 U.S. (7 Pet.) 51 (1833); Foster and Elam v. Neilson, 27 U.S. (2 Pet.) 253, 314 (1829).

14. See decision No. 58, p. 162, Jurisp. al Dia 1944 (June 22, 1944).

to refer to a few of these problems briefly: (a) conflict between a treaty and the Constitution; (b) conflict between a treaty and the national law; (c) retroactive effects of a treaty. The first two aspects must be considered at the same time with regard to the constitutions or the law prior to the treaty and to the Constitution and the law enacted after the treaty.

Conflict between a treaty and the Constitution. What is the solution when the treaty conflicts with a preexisting constitutional rule? The Constitutions of Argentina (article 19), El Salvador (article 46, No. 29), Mexico (article 133), and Nicaragua (article 324) expressly state in one way or another that treaties should be in accord with the Constitution. In the other countries, even though not expressly stated, the principle that treaties cannot infringe upon the Constitution is implied. We have already seen that they are equal to the law in their force and effect and we know that within the juridical conceptions of our countries and the so-called hierarchy of the norms, the Constitution always predominates over the law.

Of course there is a contrary opinion, especially in Europe. "International practice," says Georges Scelle, "tends to admit that the internal legislation, even when constitutional, cannot establish rules contrary to positive international law; that if there is a conflict between the constitutional rules and the treaties, the constitutional provisions shall *ipso facto* be considered null and void; and that finally it is impossible to invoke previous constitutional rules for the purpose of refusing to apply a treaty."[15] And among Latin-American internationalists, Mr. Accioly of Brazil seems to share this opinion. We can even recall that the Permanent Court of International Justice (Consultative Opinion of February 4, 1932) proclaimed that "a State cannot adduce as against another State its own Constitution with a view to evading obligations incumbent upon it under international law or treaties in force."

But in my opinion the general tendency in America is to the contrary. Perhaps due to the greater importance that we ascribe to the Constitution, or because we have a more solemn or more rigid conception of it, we maintain that any rule is invalid, whether of a law or of a treaty, that infringes upon the Con-

15. Quoted by 2 ACCIOLY, TRATADO DE DERECHO INTERNACIONAL PÚBLICO, no. 1252 (1946).

stitution. In this respect several authors may be mentioned, such as Solórzano, Alvarado Garaicoa (Ecuador), Ruiz Moreno[16] (Argentina), and Cruchaga (Chile), the last of whom cites a decision of the Supreme Court of Chile of 1917 which declared that such a conflict should be decided by the constitutional rules in preference to those of international law.

Although the consideration of this subject with regard to the courts of the United States is to be handled today by my excellent friend and outstanding internationalist, Mr. Quincy Wright; relying on his benevolent consent and in that of those listening to me, I will make a few observations due to the great importance that the doctrine of the United States Supreme Court has on this subject throughout the rest of the continent.

In the first place, I believe that not one single instance can be cited of a treaty that has been declared unconstitutional by the courts of the United States. But its Supreme Court has made incidental declarations on the problem. Thus in the case of *Thomas v. Gay* (169 U.S. 264 [1897]) it said that "a treaty cannot change the Constitution of the United States or be held valid if it be in violation of this instrument." Other cases that I have seen cited are those of *Fort Leavenworth Railroad Company v. Low* (114 U.S. 525 [1885]), and *Geofroy v. Riggs* (133 U.S. 258 [1889]). And yet it seems to me the case that is cited as being contrary to that thesis, that is, *Missouri v. Holland* (252 U.S. 416 [1920]) has been made to say more than it really expresses.

In the American doctrine we also find writers who share the same opinion that a treaty cannot prevail against the Constitution; and although Fenwick maintains that the foreign State has the right "to take the approval of the Senate and the subsequent ratification of the treaty by the President as a final decision in respect to the constitutionality of the treaty," he im-

16. Solórzano, *La obligatoriedad de los tratados internacionales en las relaciones privadas*, in REV. DE DERECHO INTERNACIONAL (LA HABANA) 22 (September 1930); ALVARADO GARAICOA, PRINCIPIOS NORMATIVOS DEL DERECHO INTERNACIONAL 34 (1946); Ruiz Moreno, *Relaciones entre el derecho nacional y el derecho internacional en América*, in PROCEEDINGS OF THE EIGHTH AMERICAN SCIENTIFIC CONGRESS 88 (1940); Cruchaga Ossa, *Relaciones entre el derecho internacional y las legislaciones nacionales*, in 10 PROCEEDINGS OF THE EIGHTH AMERICAN SCIENTIFIC CONGRESS 60 (1940); JIMÉNEZ DE ARÉCHAGA, CURSO DE DERECHO INTERNACIONAL 84 (mimeographed shorthand notes by J. B. Míguez, 1949); RABASA, EL DERECHO INTERNO Y EL DERECHO INTERNACIONAL 101 (1933). See also *Los tratados en el derecho constitutional Mexicano*, in EL FORO 197 (June 1948).

mediately adds that in that case it is necessary to take the necessary steps to obtain the derogation of the treaty.[17]

Consequently, and due to the generality of the opinions regarding the predominance of the Constitution, I do not believe that any national court in our countries would maintain the validity of a treaty as against a constitutional provision.

Another aspect of the problems of an international convention in conflict with the Constitution arises when, after the effective date of a treaty, the Constitution is amended and rules in conflict with such treaty are inserted therein.

Should the question be decided by an international tribunal I believe the decision would be in the sense that the new constitutional rule does not affect the full validity of the treaty and the State would be ordered to fulfill it or to make indemnity.[18] But in an internal order (which is the subject of our study) it seems to me impossible for a national court to decide in the same way, because the principle that the Constitution annuls a prior law that contravenes it is common, not only because it, in itself, is a later law, but also because of the doctrine of the hierarchy of the juridical rules under which the Constitution always prevails over all others.[19]

Let us not lose sight of the fact that there are sixteen Latin-American countries (Argentina, Bolivia, Brazil, Colombia, Costa Rica, Cuba, Chile, El Salvador, Guatemala, Haiti, Honduras, Mexico, Nicaragua, Panama, Uruguay, and Venezuela) whose Constitutions vest in the judicial power the authority to decide upon the constitutionality of the laws. That is, in all of them, a power of the State which has not taken part in the conclusion of the treaty has the power later to declare that it is in conflict with the Constitution.

The problem is a serious one because although it is not likely to happen that a government signs and ratifies an international convention which clearly violates its Constitution, it might occur that in its judgment any such violation does not exist, and later the courts through the claim of some private person may declare that the treaty violates the Constitution.

17. FENWICK, INTERNATIONAL LAW 434 (3d ed. 1948).
18. See article 11 of the *Convention on Treaties of 1928* (Havana).
19. JIMÉNEZ DE ARÉCHAGA, CURSO DE DERECHO INTERNACIONAL 82 (mimeographed shorthand notes by J. B. Míguez, 1949).

No matter how disturbing such a declaration may be to the international order, I believe that it must be accepted as effective to deprive the treaty of validity in an internal order, because the Constitution is the supreme law and over it nothing can prevail.

We must bear in mind that to the peoples of America the Constitution is something more than the document that contains the political organization of the nation; it is also the fundamental charter that guarantees the individual rights and protects man against the abuses of power. If it should be admitted that a treaty can derogate the Constitution we would be opening the door so that, through international conventions, the Executive in connivance with Congress or with the Senate, might change constitutional provisions and deprive the citizens of some of their rights. I realize that this is the very fear that was expressed one hundred and sixty years ago by Mr. Gallatin in the United States House of Representatives, and that history has shown that his fear was more theoretical than real, but, at all events, the possibility exists. I realize that the doctrine of the subordination of the treaty to the Constitution is an obstacle to the development of international law; but whatever may be the opinion that is maintained in a theoretical order, the fact is that we have not yet reached the stage in which national courts are willing to accept a different solution.

The problem is a specially delicate one as against the other contracting State which in good faith accepted the convention believing it to be perfect. I believe that it is necessary to distinguish between the effect of a treaty upon the signatory States and upon private individuals. With regard to the latter, if an interested party contests the convention and succeeds in having the national court declare it in conflict with the Constitution, there is no doubt that, just as occurs in the case of the laws, it cannot continue to be applied as an effective rule in the internal order. But the other State might have grounds for a claim in the international field in order that it be indemnified for damages that it or its citizens may have suffered. However, this problem is outside the topic we are considering.[20]

Another question that is closely connected to this subject is

20. To meet this contingency, the government of the United States has inserted in some treaties (*e.g.*, treaty with Japan of May 31, 1928) a clause providing that in case it could not fulfill the convention due to a judicial decision, the treaty would be considered as no longer in force. See DE VISSCHER, DE LA CONCLUSION DES TRAITÉS INTERNATIONAUX 88 (1943).

to know whether the remedy granted to contest laws that are in conflict with the Constitution can be used against treaties.

Limiting this question to Cuba, our Supreme Court decided the question negatively in its Decision No. 8 of March 10, 1911 (in a matter of constitutionality), because article 83 of the 1901 Cuban Constitution, as well as the supplementary law of March 31, 1903, allowed an appeal exclusively against the laws, decrees and regulations which infringe upon the Constitution, but did not mention treaties; and although these are on an equal basis with the laws, it could not be interpreted that such assimilation was so complete in order to consider them included under the generical term of *laws* used by the Constitution.

I believe that the solution today would be different because article 174, section (d) of the 1940 Constitution grants a judicial remedy against "laws, decree-laws, decrees, regulations, resolutions, orders and provisions and other acts of any organ, authority or official." And article 127-*bis* of the Organic Law of the Judicial Power promulgated to apply this provision of the Constitution speaks of "laws, resolution-laws, decree-laws, decrees, regulations, resolutions, orders, rulings, provisions, measures or other acts of any organ or power of the State, organization, authority, official or autonomous organization." Those articles are so broad that even though treaties are not expressly mentioned, they are undoubtedly included in that list. For that reason I believe that it is almost certain that our Supreme Court would reverse its doctrine and recognize the possibility of making use of the appeal in tests of constitutionality against treaties.

Conflict between a treaty and the national law. A treaty may be in conflict with a previous law but this is a point that offers no difficulties either in doctrine or in the courts. Both having recognized that treaties have the force of law, the logical consequence is that when an international convention takes effect, all the laws that are in conflict therewith are expressly or tacitly repealed. As the Brazilian jurist Philadelpho Azevedo has said, "if the law is previous there really is no problem, because the treaty is a later law that abrogates the previous one."[21] The same doctrine has been admitted by the Supreme Court of the United States: "A treaty may supersede a prior act of Congress." (*Thomas v. Gay*, 169 U.S. 264 [1897]). The matter was succinct-

21. Azevedo, *El conflicto de interpretación entre el tratado internacional y la le interna*, in REV. D.J.A. 161 (June 1914).

ly stated by Justice Cardozo: "A treaty, if in force, is the supreme law of the land and supersedes all local laws inconsistent with its terms." (*Techt v. Hughes*, 229 N.Y. 222, 128 N.E. 185 [1920]).

The problem of whether a treaty may be modified by a later law is much more complex. If we study it from the viewpoint of the doctrine and in the decisions of the Supreme Court of the United States, the answer is in the affirmative: "An Act of Congress may supersede a prior treaty and if it is repugnant to it to that extent abrogates it." (*The Cherokee Tobacco*, 79 U.S. (11 Wall.) 616 [1870]). That is the logical solution under the system of the full equivalence of the law and of a treaty. If a treaty, because it has the force of law, can abrogate the law, the later law in turn can abrogate the treaty.

The same doctrine has been accepted by the Cuban courts. In decision No. 561 of October 4, 1949 (in a contentious administrative matter), the Supreme Court of Cuba declared that a tax created by Law No. 28 of 1941 could be collected, in spite of the fact that the law was in conflict with the treaty signed with Spain in 1927, because the law as such was binding on the courts and because the treaty had no hierarchy or force greater than that of the law. In decision No. 193 of November 2, 1950 (in a matter of constitutionality) it was declared that article 142, section (g) of the Cuban Constitution does not say that a treaty has binding force greater than that provided in the law. And in five decisions handed down in 1951 (Nos. 224, 236, 328, 404, and 849 in contentious-administrative matters) the following was said: "Aside from the respect which the clauses of treaties are worthy of in the order of government to government relations, from a strictly legal standpoint, they can have no other effect than that accorded them by the national juridical regime to which they must necessarily be subordinated; and with regard to the provisions of the Constitution of the Republic regarding the same, said treaties do not have the force of constitutional rules nor do they appear to be vested with a binding force greater than that of the law which, because it is enacted by Congress, represents the sovereign will of the people; wherefore in a conflict between the former and the latter, only similar in certain aspects, as the Supreme Court en banc declared on March 10, 1911, the law of a later date should be applied in accordance with the principles governing the matter."

That is the viewpoint gathered from the decisions of our courts, and I imagine that the situation must be the same in the majority of the Latin-American countries due to the generality of said doctrine.[22] However, there is a tendency against this view, that is, the contrary thesis that a treaty cannot be abrogated by a subsequent national law. The latter is the European tendency as contained in article 28 of the French Constitution and as followed by some Latin-American writers[23] (Accioly, Solórzano, Azevedo, Planas Suárez, Chediak, Rabasa). Azevedo cites a decision of the Federal Supreme Court of Brazil (January 7, 1914) and Cruchaga Ossa mentions two decisions, one of the Chilean Supreme Court (November 25, 1919) and another of the Supreme Court of Guatemala (March 31, 1937), all of which upheld the validity of treaties as against later laws that were in conflict with them.

The problem, it seems to me, is one of supremacy of norms. The juridical rules may be of several kinds, each one with its own special value. The most current classification is the tripartite division into constitutional, legal, and regulatory norms. That is, the Constitution prevails over the law and the regulations; the law prevails over the regulations, but cannot be in conflict with the Constitution; and the regulations can neither conflict with the law nor with the Constitution. Where does a treaty come in under this classification? The decisions of the Supreme Court of the United States and of Cuba vest a treaty with the same value as a law and consequently give it the same juridical value. Consequently, a treaty is subordinated to the Constitution and above the regulation; but inasmuch as it is on the same plane as a law and has the same force, it abrogates the prior law and is superseded by that promulgated after it.

The principle — adopted by the Supreme Courts of Cuba and of the United States — that the law supersedes a prior treaty is based on the assumption that both have the same effect, but

22. See JIMÉNEZ DE ARÉCHAGA, CURSO DE DERECHO INTERNACIONAL 82 (mimeographed shorthand notes by J. B. Míguez, 1949).

23. 2 ACCIOLY, TRATADO DE DERECHO INTERNACIONAL PÚBLICO, no. 1252 (1946); Solórzano, *La obligatoriedad de los tratados internacionales en las relaciones privadas*, in REV. DE DERECHO INTERNACIONAL (LA HABANA) 26 (September 1930); Azevedo, *El conflicto de interpretación entre el tratado internacional y la le interna*, in REV. D.J.A. 162 (June 1914); 1 PLANAS SUÁREZ, TRATADO DE DERECHO INTERNACIONAL PÚBLICO 151 (1916); CHEDIAK, APLICACIÓN DE LAS CONVENCIONES INTERNACIONALES POR EL DERECHO NACIONAL 7 (1937); Cruchaga Ossa, *Relaciones entre el derecho internacional y las legislaciones nacionales*, in 10 PROCEEDINGS OF THE EIGHTH AMERICAN SCIENTIFIC CONGRESS 60 (1940); RABASA, EL DERECHO INTERNO Y EL DERECHO INTERNACIONAL 102 (1933).

disregards the fact that the nature of the treaty is not exactly the same as that of the law, and that the methods of their creation are also different.

In the first place, it dispenses with the contractual aspects of treaties and in so doing admits, under international law, the possibility that contracts may be freely changed by only one of the parties thereto. This is a violation of the rule *pacta sunt servanda* which not only is one of the most ancient and firmly established rules in the relations between peoples, but in America is part of its positive law as shown by the following provisions of the Charter of the Organization of American States which we might call the Constitution of the Continent: "Article 5. — The American States reaffirm the following principles: . . . (b) International order consists essentially of respect for the personality, sovereignty and independence of States, and the faithful fulfillment of obligations derived from treaties and other sources of international law," and "Article 14. — Respect for and faithful observance of treaties constitute standards for the development of peaceful relations among States."

In the second place, a law and a treaty are born in a different manner. The law is the exclusive product of the will of a Congress; therefore, the Congress can abrogate by itself that which it established. But as the powers of the two States have to intervene in the making of a treaty, it does not seem admissible for the Legislative Power of one of them, by itself, to be able to destroy what also required the will of the other State to be created. It is true that denouncement is the unilateral form of putting an end to a treaty, but aside from the fact that such is a method accepted by international law, it requires the intervention of the other party even though this be in a passive manner, when it is advised that the convention is not to continue in force.

National sovereignty has also been invoked unmindful of the fact that it acts at the time that it decides whether the treaty be signed or not; but once it has been signed, it cannot authorize its unilateral invalidation through a law, thus infringing the essential rules of international life.

Reflecting the criterion that treaties cannot be changed in such a manner, article 10 of the 1928 Havana Convention provides that "No State can relieve itself of the obligations of a treaty or modify its stipulations except by the agreement, se-

cured through peaceful means, of the other contracting parties."

The acceptance of the rule that a treaty cannot be modified or superseded by a national law implies an admission that it constitutes a separate category in the hierarchic scale of the rules, placed under the Constitution and above the laws and the regulations. Thus we would have four classes, in this order: the Constitution, treaties, laws, regulations. It is interesting to state that article 28 of the French Constitution provides that "diplomatic treaties that are properly ratified and published shall have a higher authority than that of internal laws; their provisions may not be abrogated, modified or suspended except as a consequence or a regular denouncement notified through diplomatic channels."

This criterion means that since a treaty is an act of international law, which arises by virtue of a special procedure and is extinguished by precise causes, it cannot be abrogated by a method that is entirely different and inapplicable, as is a law, by an internal and unilateral act.

Finally, let us see what basis this thesis finds in the Cuban Constitution. In the first place, its article 7 provides that "the Cuban State accepts the principles and practices of international law that promote human solidarity, respect for the sovereignty of peoples, reciprocity among States and peace and universal civilizations."

If this precept is something more than a mere lyric declaration, it does mean that our Constitution accepts the principles of international law which it mentions in a general way. It is the duty of the courts of justice, especially the Supreme Court, to determine what those principles are, a function in which it must of course act with the greatest care. But regardless of how strict the selection may be, there is no doubt that one of the most ancient postulates and one firmly imbedded in international law, is that of respect for treaties which, as we have already observed, has already become positive law for the countries of America by being incorporated in articles 5 and 14 of the Charter of the Organization of American States inserted above. And undoubtedly that principle has been infringed when a treaty is unilaterally abrogated by a law originating solely from one of the parties.

On the other hand, section (g) of article 142 of our Cuban

Constitution, in providing that international treaties concluded by the President must be submitted "to the approval of the Senate without which requisite they will have no binding force upon the Republic," is implicitly saying that when the Senate has approved them they are valid and binding on the Republic, that is, that what has been stipulated therein becomes an obligation constitutionally recognized by the Republic, and since the Republic and the Constitution stand above Congress and the laws, the rule inserted in the treaty ranks above the law and cannot be modified or abrogated by it unilaterally. I believe that the Supreme Court failed to see the full scope of this provision when in its decision No. 193 of November 2, 1950, it said that "it is limited to a description of the requisites that a treaty should fulfill in order that it may bind the Republic, but it does not provide the place it holds in the hierarchy of the norms and much less that it is superior, in its binding force, to what is provided in the law."

Retroactive effect of a treaty. As a general rule, treaties are not effective until after the exchange or deposit of ratifications; but the contracting States may set a different date for that purpose. Internationalists have greatly argued whether treaties have or do not have retroactive effects, some supporting the affirmative view (*e.g.*, Bluntschli, Laghi) while others believe otherwise (*e.g.*, Pessoa, Field, Accioly, Oppenheim).

Herschey and Hyde, by following the Supreme Court of the United States, distinguish between the effects on the signatory States and the effects on private individuals. Hyde says: "It is laid down as a rule of the law of nations, that in the absence of special agreement, a treaty upon the exchange of ratifications operates retroactively, as from the date of signature. This is said to be true, however, only so far as the agreement concerns the relation between State and State. With respect to the rights of private individuals, the date of operation, unless otherwise specified, is regarded as simultaneous with that of the exchange of ratifications. A treaty does not operate retroactively so as to affect vested rights acquired before the compact was concluded or signed by the signatory parties."[24] Bustamante is of the opinion that the retroactiveness "should not be applied save under very special circumstances when the ratification seems to be assured and will be rapid and when the retroactive effect does not affect

24. 2 HYDE, INTERNATIONAL LAW 49 (1922).

prior constitutional or legal provisions that involve vested rights."[25]

In the field of Cuban positive law, the Constitution, in articles 21 and 22, admits the retroactive effect of criminal laws and prohibits it as to other laws, except when the law so provides for reasons of public order, of social utility or of national necessity, expressly mentioned in the law. Even so, the affirmative vote of two-thirds of the Senate and of the House of Representatives is required, and if the reasons for the retroactivity should be contested, the Supreme Court may decide the question. The Constitutions of thirteen other Latin-American countries also establish the non-retroactivity of the laws.[26]

The Cuban Supreme Court (Decision No. 67 of September 13, 1905) said that the Treaty of Peace signed by the United States with Spain on December 10, 1898, produced its effects, not from the date of ratification on April 11, 1899, but from the time of its signing; but aside from the fact that at that time the Cuban Constitution did not exist, special circumstances concurred in that decision that do not allow the conclusion that the retroactivity of treaties was admitted by the court as a general rule.[27]

Inasmuch as the purpose of prohibiting the retroactive effect of laws has been to protect the individual against the abuses of power and because treaties have been placed on an equal basis with national laws as to their effect, I believe that the said constitutional prohibition is also applicable thereto and consequently it is possible for the Judicial Power to declare a treaty unconstitutional because it is retroactive.

With regard to private interests I also believe that in the matter of retroactivity not the date of ratification should be considered but that of the promulgation of the treaty.

CONCLUSIONS

We can summarize what we believe is the general trend in

25. 3 BUSTAMANTE, DERECHO INTERNACIONAL PÚBLICO no. 753 (1936).

26. Bolivia, article 31; Brazil, article 141, 3º; Costa Rica, article 34, Dominican Republic, article 42; Haiti, article 13; Honduras, article 54; Mexico, article 14; Nicaragua, article 123; Panama, article 44; Paraguay, article 26; Peru, article 25; Venezuela, article 30; El Salvador, article 172.

27. The same can be said of decision No. 67, Jurisp. al Día (Cont.-Adm.) 89 (May 5, 1930), in which the Convention on Trade Marks with Chile, 1923, was applied retroactively.

Latin-American law on the problem discussed in this paper, as follows:

1. An international treaty to be valid and effective in national courts has to be approved in accordance with the constitutional rules of each country.

2. To be effective in regard to private individuals it has to be duly promulgated or published.

3. The Constitution is above the treaty, so if the treaty violates the Constitution, it may be declared invalid by the courts. If the constitutional rule has been adopted after the treaty came into force, the national courts will probably decide that the treaty cannot be applied to private individuals, but the other State will be entitled to a claim in the international sphere.

4. The treaty is equivalent to a law. Consequently, it abrogates a previous national law, and is, in turn, superseded by a later law. But in my opinion the solution should be that the local law cannot abrogate an international treaty.

5. In regard to the vested rights of individuals, the treaty normally does not have retroactive effects, especially when the Constitution prohibits the retroactivity of law.

In closing these comments, I wish to express my thanks to the organizers of this regional meeting of the American Society of International Law for having invited me to take part in the proceedings. I regret that the short time at my disposal did not permit me to make a deeper and more detailed study of the question and more in line with the high scientific level of those that have been listening to me. But I trust that my remarks have not entirely lacked interest and that they have succeeded in giving you a general outlook on the aspects of the problem that I have studied in this paper in connection with Latin-America.